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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAN ROUVEN FUECHTENER,

Defendant.

Case No. 2:16-cr-00100-GMN-CWH

**GOVERNMENT'S BENCH
MEMORANDUM FOR TRIAL**

The United States of America, by and through the undersigned, submits this the following bench memorandum, as requested by the Court at calendar call on November 7, 2016. The memorandum outlines the necessary elements of the charges in the Indictment.

BACKGROUND

On March 30, 2016, a federal Grand Jury sitting in Las Vegas, Nevada, issued an indictment against the defendant, Jan Rouven Fuechtener, charging him with one count of Possession of Child Pornography, in violation of Title 18, United States Code, Section 2252A(a)(5)(B); one count of Receipt of Child Pornography, in violation

1 of Title 18, United States Code, Section 2252A(a)(2) and (b); one count of Distribution
2 of Child Pornography, in violation of Title 18, United States Code, Section
3 2252A(a)(2) and (b); and one count of Advertising of Child Pornography, in violation
4 of Title 18, United States Code, Section 2251(d)(1)(A). The indictment also contains
5 forfeiture allegations pertaining to the child pornography allegations.

6 LEGAL STANDARDS

7 A. Elements of the Offenses

8 The defendant is charged in Count One of the indictment with Possession of
9 Child Pornography, in violation of Title 18 of the United States Code, Section
10 2252A(a)(5)(B). For the defendant to be found guilty of that charge, the government
11 must prove each of the following elements beyond a reasonable doubt:

- 12 1. First, that the defendant knowingly possessed material that the
13 defendant knew contained visual depictions of minors engaged in
14 sexually explicit conduct;
- 15 2. Second, the defendant knew the visual depiction contained in the
16 material showed a minor engaging in sexually explicit conduct;
- 17 3. Third, the defendant knew that production of such a visual depiction
18 involved use of a minor in sexually explicit conduct; and
- 19 4. Fourth, that the visual depiction had been either mailed, shipped, or
20 transported in interstate or foreign commerce by any means including
21 by computer, or produced using material that had been mailed,
22 shipped, or transported, in interstate or foreign commerce by any
23

means including by computer.

See 18 U.S.C. 2252A(a)(5)(B); Ninth Circuit Manual of Model Jury Instructions, Criminal, 8.185 (2010) as modified.

The defendant is charged in Count Two of the indictment with Receipt of Child Pornography in violation of Title 18 of the United States Code, Section 2252A(a)(2) and (b). For the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

1. First, the defendant knowingly received material that contained one or more images of child pornography;
2. Second, the defendant knew the visual depiction(s) contained in the material showed a minor engaged in sexually explicit conduct; and
3. Third, the visual depiction(s) had been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer.

See Model Jury Instructions for the Ninth Circuit, § 8.184 (2014) (modified for 18 U.S.C. § 2252A(a)(2) and (b)); 18 U.S.C. §§ 2256(1), (5), and (8).

The defendant is charged in Count Three of the indictment with Distributing of Child Pornography in violation of Title 18 of the United States Code, Section 2252A(a)(2) and (b). For the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

1. First, the defendant knowingly distributed material that contained one or more images of child pornography;

2. Second, the defendant knew the visual depiction(s) contained in the material showed a minor engaged in sexually explicit conduct; and

3. Third, the visual depiction(s) had been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer.

See Model Jury Instructions for the Ninth Circuit, § 8.184 (2014) (modified for 18 U.S.C. § 2252A(a)(2) and (b)); 18 U.S.C. §§ 2256(1), (5), and (8).

The defendant is charged in Count Four of the indictment with Advertising of Child Pornography in violation of Title 18 of the United States Code, Section 2251(d)(1)(A). For the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

1. First, at the time, the victims of child pornography were under the age of eighteen years;
2. Second, the defendant knowingly caused to be made a notice;
3. Third, the notice offered to distribute visual depictions of the victims of the child pornography,
4. Fourth, the defendant knew or had reasons to know the notice would be transported across state lines or mailed, or such notice was actually transported across state lines or mailed.

See Model Jury Instructions for the Ninth Circuit, § 8.183 (2014) (modified for 18 U.S.C. § 2251(d).

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1 **B. Definitions**

2 An act is done knowingly if the defendant is aware of the act and does not act
3 through ignorance, mistake, or accident. The government is not required to prove
4 that the defendant knew that his acts or omissions were unlawful. *See* Ninth Circuit
5 Model Criminal Jury Instruction No. 5.6 (2010).

6 The word “possess” means to own or to exert control over. The word
7 “possession” can take on several different, but related meanings. The law recognizes
8 two kinds of possession: actual possession and constructive possession. A person
9 knowingly has direct physical control over a thing at a given time is then in actual
10 possession. A person, who, although not in actual possession, knowingly has both
11 the power and the intention at a given time to exercise dominion or control over a
12 thing, either directly or through another person or persons, is then in constructive
13 possession of it. In order to prove that defendant had possession of child
14 pornography, the government must prove a sufficient connection between the
15 defendant and the child pornography to support an inference that the defendant
16 exercised dominion and control over it. *See* Kevin F. O’Malley, Jay E. Grenig, and
17 Hon. William C. Lee, *Federal Jury Practice and Instructions* 16:05 (6th Ed. 2008)
18 (modified) (modification: deletion of last two paragraphs from stock instruction);
19 *United States v. Romm*, 455 F.3d 990, 999 (9th Cir. 2006); *see also United States v.*
20 *Carrasco*, 257 F.3d 1045, 1049 (9th Cir. 2001).

21 The term facility or means of interstate commerce includes Internet
22 communications and telephone communications transmitted from one State, foreign
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country, or to another State. *See* 18 U.S.C. § 10.

“Child pornography” means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct. *See* 18 U.S.C. § 2256(8). “Minor” means any person under the age of 18 years. *See* 18 U.S.C. §2256(1).

“Sexually explicit conduct” means actual or simulated:

- a. sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or opposite sex;
- b. bestiality;
- c. masturbation;
- d. sadistic or masochistic abuse; or
- e. lascivious exhibition of the genitals or pubic area of any person.

See 18 U.S.C. §2256(2)(A).

“Visual depiction” includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format. *See* 18 U.S.C. § 2256(5).

DATED this 14th day of November, 2016.

Respectfully submitted,

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//s//

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